

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TINA L. SIGNER

Claimant

VS.

**WICHITA STATE UNIVERSITY /
STATE OF KANSAS**

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Carrier

Docket No. 1,014,700

ORDER

Claimant requests review of the March 19, 2004 preliminary hearing Order entered by Special Administrative Law Judge (ALJ) Vince Bogart.

ISSUES

Following a preliminary hearing, the ALJ denied claimant's request for ongoing medical treatment by an authorized physician and temporary total disability benefits. The ALJ concluded claimant has failed to satisfy her burden of proof.¹

The claimant requests review of this determination alleging the ALJ erred. Claimant adamantly maintains that she has sustained a repetitive injury to her low back "every

¹ It is unclear from the ALJ's Order whether this finding is based upon the element of notice, timely written claim and/or whether claimant's injury arose out of and in the course of her employment. Each of these issues is statutorily considered jurisdictional under K.S.A. 44-534a, thus the Appeals Board has the authority to consider this appeal.

working day to 12/10/03".² Claimant contends she gave her employer proper notice of her ongoing back complaints, although no treatment was offered or requested. She further maintains the medical evidence provided at the preliminary hearing substantiates her contention that she sustained a series of microtraumas during the entire period she worked for respondent as a janitor. Thus, claimant asks the Appeals Board (Board) to reverse the ALJ's denial of benefits.

Respondent and its insurance carrier argue that claimant failed to prove the essential elements of her claim, specifically that she sustained an injury arising out of and in the course of her employment with respondent. Therefore, respondent and its insurance carrier maintain the ALJ's decision to deny claimant's request is substantiated by the medical evidence, including a supplemental report issued by Dr. Paul S. Stein, and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant has been employed as a custodian since 1996. Her duties included "general custodial work",³ stripping and waxing floors, vacuuming, shampooing carpets and doing windows. Claimant testified that she had no back problems before working for respondent. According to claimant, while cleaning windows and stripping and waxing floors at work, she began to notice back problems. When asked when this occurred, claimant replied "I can't really tell you because it was off and on, on different dates."⁴

It is unclear from the record precisely what period of time claimant might be referring to, but according to the medical records, claimant first sought treatment for her back on November 30, 1997. During this visit, she complained of low back pain after she was involved in "some heavy lifting".⁵ There is no mention of work being the source of her injury although claimant recalls this event and the visit to her primary care physician.

Thereafter, on December 29, 1999, claimant sought treatment again from the same facility, this time seeing Dr. Barbara S. Coats. She reported an acute onset of lower back pain two nights before, over the Christmas holidays. According to claimant, she "woke up

² E-1 filed with the Division of Workers Compensation on January 8, 2004.

³ P.H. Trans. at 6.

⁴ *Id.* at 7.

⁵ *Id.*, Resp. Ex. 1 at 1.

in the morning and my back and leg were just hurting real bad.”⁶ Claimant testified that Dr. Coats indicated this was not a work-related event and for that reason, she did not consider filing any sort of claim. There is nothing within Dr. Coats’ notes that indicate one way or another whether she considered the relationship between claimant’s work and her ongoing low back complaints.

Claimant continued seeing Dr. Coats who ultimately referred her to Dr. Leonard Klawns. Dr. Klawns diagnosed a left L5 extruded disc. Her symptoms stabilized and Dr. Klawns returned her to work but according to the records, claimant was unable to do so. Dr. Klawns then recommended a left L5-S1 laminectomy. Surgery was done on March 28, 2000. Claimant requested and was granted Family Medical Leave for the period March 28 to May 10, 2000 while she recovered.

According to claimant, she returned to work with some undefined restriction which respondent did not always accommodate. She sought treatment from Dr. Coats in October 2000 complaining that the aching in her left leg “is much worse by the end of the day.”⁷ Again, there is no connection expressed between work and her ongoing complaints. Claimant was also seen by Dr. Charles D. Pence, an associate of Dr. Klawns, who concluded she had an irritative disk and suggested epidural steroid block. When those failed to relieve her symptoms, she had a second surgery in December 2003. This time Dr. Pence performed a fusion. Claimant again asked for and was granted Family Medical Leave from the date of surgery up to April 12, 2004. These forms indicate claimant’s condition is not work-related and dates back to 1999.

While in the hospital recovering from surgery, claimant testified that her roommate’s son suggested that her ongoing back problems were work-related. A written claim was served on January 7, 2004 and an E-1 was filed on January 8, 2004. According to claimant, Dr. Coates had told her this was not a work-related condition. For that reason, she did not pursue her claim, in spite of the fact that she adamantly maintains she knew work was aggravating her symptoms. Moreover, she also testified that Drs. Charles D. Pence, Earl C. Mills and Rosalie R. Foeken, all who had been treating her at various times after Dr. Klawns retired, all concluded work was responsible for her low back condition.⁸ There is no such indication in the medical records.

While recovering from her second surgery, claimant was evaluated by Dr. Pedro A. Murati, at her attorney’s request. Dr. Murati took a history from claimant but did not have the benefit of her medical records dating back to 1999, which includes the operative report from her March 2000 surgery. Nonetheless, he concluded claimant’s low back pain was

⁶ *Id.* at 25.

⁷ *Id.*, Resp. Ex. 1 at 8, Dr. Coats’ entry dated 10/24/2000.

⁸ *Id.* at 28.

a direct result from the work-related injury that occurred each working day to December 10, 2003 during employment with respondent.⁹

Respondent retained Dr. Paul S. Stein to examine claimant and opine on the causation aspects of claimant's low back complaints. Dr. Stein examined claimant on February 11, 2004, just days after Dr. Murati saw her. Like Dr. Murati, Dr. Stein did not have the benefit of the 1999 medical records relating to claimant's first round of treatment and surgery. Dr. Stein concluded that "[t]he question of whether there is an aggravation of the underlying disk disease by work activity over the ensuing years can also not be answered with the information currently available. Records of medical care during that time would need to be reviewed to see if there is any documentation regarding work activity causing symptomatology."¹⁰

The Board notes there was a supplemental report from Dr. Stein offered with respondent's submission letter. That report has not been considered as it was not provided to the ALJ at the preliminary hearing. Absent a stipulation, the Board does not consider evidence that was not presented to the ALJ.¹¹

Claimant testified that she told all her supervisors of her pain on repeated occasions. However, when specifically asked whether she explained to them the connection between work and her low back pain, she indicated "I am pretty sure I did after the first initial surgery."¹² Respondent offered no evidence to dispute claimant's testimony. Although claimant maintains she continued to tell her supervisors of her ongoing back pain, there is nothing within her testimony that provides any specificity whatsoever as to when she gave such notice, other than the vague reference above. It is undisputed, however, that when she requested Family Medical Leave, she indicated her need for surgery was not work-related.

When presented with this evidence, the ALJ stated as follows:

"I am afraid from my standpoint there is so many intangibles here that you are going to have to proceed with your claim and see if you can make--have a judge find it is work related. I don't think I can do that at this point and I don't think I can make the orders you want. I want you to know it isn't that I don't think you might not succeed, but it is just at this point I think there is too much ambiguity for me to make that kind

⁹ *Id.*, Cl. Ex. 2 at 2.

¹⁰ *Id.*, Resp. Ex. 2 at 4.

¹¹ K.S.A. 44-555c(a).

¹² *Id.* at 8.

of ruling. You, I know, can go ahead and get your hearing. You have most of your testimony in here already, I guess.”¹³

The ALJ issued an order denying claimant’s request. In essence, the ALJ appeared to conclude that claimant had failed to meet an essential element of proof on at least one of the underlying compensability issues.

The Board has reviewed all the evidence presented to the ALJ and concludes the ALJ’s Order should be affirmed. It is claimant’s burden to prove the elements of her claim.¹⁴ After considering all of the medical records as well as claimant’s own uncontroverted testimony, the Board remains unpersuaded that claimant sustained a series of microtraumas culminating on December 10, 2003. Rather, the greater weight of the evidence, at best, indicates claimant sustained a work-related injury in December 1999. The Board is equally unpersuaded that claimant provided the requisite notice in a timely and sufficiently specific manner for an accident that occurred in December 1999.¹⁵

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.¹⁶

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Vince Bogart dated March 19, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John C. Nodgaard, Attorney for Respondent and its Insurance Carrier
Vince Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹³ *Id.* at 39.

¹⁴ K.S.A. 44-501(a).

¹⁵ See K.S.A. 44-520.

¹⁶ K.S.A. 44-534a(a)(2).